SAEI SUSER

v.

JABATAN PERKHIDMATAN AWAM MALAYSIA & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[ORIGINATING MOTION NO: 25-04-95-I]
18 FEBRUARY 2002

CIVIL PROCEDURE: *Action - Reinstatement - Failure to appear for hearing - Whether court has jurisdiction to reinstate motion - Section 3 of Courts of Judicature Act 1964 and O. 5 r. 1 of Rules of the High Court 1980 - Whether proceedings an "action" within O. 35 r. 1(1) of Rules of the High Court 1980*

CIVIL PROCEDURE: *Action - Reinstatement - Failure of advocate to appear for hearing - Whether constitutes sufficient ground for court to exercise discretion under O. 35 r. 1(1) of Rules of the High Court 1980*

After obtaining leave, the plaintiff had filed a motion for an order of mandamus. However, the plaintiff and his advocate were absent at the date set for hearing and the motion was dismissed. This was an application by the plaintiff to reinstate the motion on the ground that counsel failed to appear on the hearing date.

Held:

[1] In the context of deciding whether a proceeding is an "action", proceedings commenced by origination motion should not be treated any differently from one begun by originating summons. (p 183 i)

[2] By virtue of s. 3 of the Courts of Judicature Act 1964 and O. 5 r. 1 of Rules of the High Court 1980, the present proceedings was an "action" within O. 35 r. 1(1) of Rules of the High Court 1980. Accordingly, the plaintiff could apply to reinstate the action. (p 183 g)

[3] The litigant, as far as possible and where no injustice is caused, should not be visited with the fault of the lawyer. This meant that the mistake of an advocate could be a factor for moving the exercise of the court's discretion. (p 184 f-g)

[4] As leave had already been granted to apply for mandamus and the application proper had been filed, the motion was to be heard again. (p 184 g)

[Application to reinstate motion granted.]

Case(s) referred to:
Chua Cheng Wan v. Chua Thiam Siew & Ors [2000] 1 CLJ 433 ***(dist)***
Gan Kim Kiat & Bros Realty Sdn Bhd v. Leang Ah Kan [1983] 1 CLJ 298; [1983] CLJ (Rep) 558 ***(refd)***
Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor [2001] 4 CLJ 1 ***(refd)***
In Re Fawsitt, Galland v. Burton [1885] 30 Ch D 231 ***(refd)***
Re Edward's Will Trusts [1981] 3 WLR 15 ***(refd)***
Sinnathamby & Anor v. Lee Chooi Ying & Anor [1987] 1 CLJ 157; [1987] CLJ (Rep) 336 ***(dist)***
Soon Huat Construction Sdn Bhd v. Kiong Siang Construction Sdn Bhd [1999] 3 CLJ 778 ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3
Rules of the High Court 1980, O. 5 r. 1, O. 35 rr. 1(1), 2

For the applicant - Baru Bian; M/s Baru Bian & Co
For the respondents - Azizah Nawawi SFC

Reported by M Maheswaran

JUDGMENT

Ian HC Chin J:
The motion filed on 1 December 2000, after leave was obtained, by the plaintiff Saei Suser for an order of *mandamus* directed at the director of public services department to have him placed on certain salary scale came up for hearing on 2 February 2001. No one appeared at the appointed date and time and the court dismissed the motion. On 12 October 2001 the plaintiff applied to have the motion reinstated for hearing on the ground that his advocate had failed to remind himself of the date of hearing. The advocate had failed to record the hearing date in his diary as a result of which he failed to appear in court on the appointed date. The leave was obtained before O. 53 was amended providing for special forms for application for judicial review (instead of originating motion or originating summons).

Azizah Nawawi, learned Senior Federal Counsel for the defendants, argued that, firstly, the court has no jurisdiction to reinstate the case, citing *Chua Cheng Wan v. Chua Thiam Siew & Ors* [2000] 1 CLJ 433 and secondly, that the mistake of an advocate cannot be a ground for the court exercising its discretion, citing the several well-known authorities on the point.

Has The Court Jurisdiction To Reinstate A Case?
It appears that in *Chua Cheng Wan v. Chua Thiam Siew & Ors*, a decision of Abdul Wahab Patail J, the court did rule that a High Court has no jurisdiction to reinstate an action that has been struck off. That action was struck out after a hearing pursuant to a show-cause notice that was issued to

the plaintiff for their failure to file a summons for directions. The learned judge there, I am of the respectful view, was correct in his decision that there should have been an appeal against the striking out of the action instead of an application to reinstate the action. There was a hearing on the merit. But the present case is not concerned with such a situation but with an originating motion that was struck off because nobody appeared at the appointed date of hearing. The case was not disposed off on its merit and there the order striking out the originating motion was not even drawn up. So, the case of *Chua Cheng Wan v. Chua Thiam Siew & Ors* is not applicable here. The statement of law laid down there is only applicable to the facts of that case.

Baru Bian, learned counsel for the plaintiff, contended that O. 35 r. 1(1) of the Rules of the High Court 1980 should apply. That order says:

> If, when the trial of an action is called on, neither party appear, the action may be struck out of the list without prejudice, however, to the restoration thereof, on the direction of a judge.

For that rule to apply, "the trial of the action of the action" was "called on". Could the hearing of an originating motion be regarded as "the trial of an action" so as to attract the application of that rule? It was held in *In Re Fawsitt, Galland v. Burton* [1885] 30 Ch D 231 that proceedings commenced by originating summons are an action, where the use of an originating summons is prescribed by the English Rules of the Supreme Court. Section 3 of our Courts of Judicature Act 1964 says:

> "action" means a civil proceeding commenced by writ or in such other manner as is prescribed by rules of court, but does not include a criminal proceeding.

The "other manner" of commencing a civil proceeding other than by writ is set out in O. 5 r. 1 of the RHC and it says:

> Subject to the provisions of any written law and of these rules, civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition.

Thus, by virtue of s. 3 of the Act and O. 5 r. 1, the present proceedings which are commenced by an originating motion is an action within the meaning of O. 35 r. 1(1). So, the plaintiff can apply under that order for a reinstatement of the action.

In *Re Edward's Will Trusts* [1981] 3 WLR 15 the prayer of an originating summons for a declaration was granted in the absence of the defendant. The defendant appealed against the order. The Court of Appeal held that the proper course for the defendant to have adopted would have been to apply to the judge in the lower court that made the order for a new trial under the English O. 35 r. 2 which is similar to our O. 35 r. 2. The Court of Appeal also held

that it had the jurisdiction to order a new trial. Thus, a hearing of the originating summons was regarded as a trial of an action. I see no reason why a proceeding commenced by an originating motion should be treated differently from one commenced by an originating summons when deciding whether such a proceeding is an action.

Can The Mistake Of An Advocate Constitute Sufficient Ground For The Exercise Of A Discretion?

The court has a discretion whether to reinstate the case (see *Gan Kim Kiat & Bros Realty Sdn Bhd v. Leang Ah Kan* [1983] 1 CLJ 298; [1983] CLJ (Rep) 558). Azizah Nawawi, learned Senior Federal Counsel, contended that negligence or mistake of the advocate in failing to remind himself of the date of hearing and consequently in failing to attend court on that day cannot constitute a valid ground for moving the exercise of it. Learned counsel had referred to a string of cases which concern appeals and they were for extension of time. In the latest case of *Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor* [2001] 4 CLJ 1, the Court of Appeal said: "The mistake of the appellant's solicitors did not constitute a sufficient ground for extension of time". All the cases, I have the occasion to refer and comment on in *Soon Huat Construction Sdn Bhd v. Kiong Siang Construction Sdn Bhd* [1999] 3 CLJ 778 and how I was of the view that *Sinnathamby & Anor v. Lee Chooi Ying & Anor* [1987] 1 CLJ 157 SC; [1987] CLJ (Rep) 336 had held that the mistake of an advocate is a factor that can be considered should be followed. Therefore, if those cases are relevant I would have opted to follow *Sinnathamby & Anor v. Lee Chooi Ying & Anor*. But I am of the view that they are not relevant for the purpose of the present case.

The present case concerns an application under O. 35 r. 1(1) for a reinstatement of the case for which no time limit has been set out for the application to be made though it is trite law that the application should be made as soon as possible. Since it is not an issue and I will take it that the application was made as soon as possible. I am of the view that the litigant, as far as possible and where no injustice is caused, should not be visited with the fault of his lawyer. This means the mistake of an advocate can be a factor for moving the exercise of the discretion of the court. In this case leave was already granted to apply for the order of *mandamus* and the application proper had been filed. All that is needed now is a new hearing date. The motion is to be heard again on 7 March 2002.